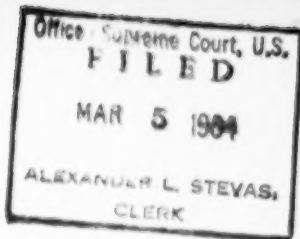


83-1385



NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD A. BROWN AND
CAROL BROWN, HIS WIFE

PLAINTIFFS/PETITIONERS

v.

SKI ROUNDTOP, INC.,
T/D/B/A SKI LIBERTY

DEFENDANT/RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
CIVIL ACTION NO. 80-0403

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

DUANE, MORRIS & HECKSCHER
BY: Edward Griffith
I.D. No. 17736
53 Darby Road
Paoli, PA 19301
(215) 647-3555

QUESTIONS PRESENTED FOR REVIEW

1. Where the trial judge denied a Motion for New Trial based on after-discovered evidence, because such evidence was merely cumulative, does that denial present a conflict with a First Circuit case where a Motion for New Trial based on after-discovered evidence was also denied, but on the alternative ground of lack of merit?

2. When a trial judge properly exercises discretion in limiting the scope of discovery and cross-examination, in declining to give a certain requested charge to the jury, and in denying a Motion for New Trial based on after-discovered evidence, are such rulings a substantial departure from accepted law so as to justify the case being heard by the Supreme Court?

TABLE OF CONTENTS

Questions Presented for Review	i
Table of Authorities	iv
Counterstatement of the Case	1
Summary of Argument	4
Argument	

I. THERE IS NO BASIS FOR GRANTING
A WRIT OF CERTIORARI IN THIS
CASE

- A. The Third Circuit's Judgment Order in this case, affirming the District Court's judgment, does not conflict with the First Circuit's decision in Krock 7
- B. The Third Circuit has not sanctioned any departure from the accepted and usual course of judicial proceedings to as to call for an exercise of this Court's supervision 10
1. The trial court did not abuse its discretion in limiting the scope of discovery and cross-examination 11
2. The trial court did not err in refusing to instruct the jury on plaintiff's requested Point for Charge #4 13
3. The trial court did not abuse its discretion in denying Plaintiff's

Motion for New Trial
on the basis of newly
discovered evidence . . . 15

Conclusion 17

TABLE OF AUTHORITIES

Cases

<u>Borden Company v. Sylk,</u> 410 F.2d 843 (3rd Cir. 1969)	11
<u>Giordano v. McCartney,</u> 385 F.2d 154 (3rd Cir. 1967)	15, 16
<u>Hallberg v. Brasher,</u> 679 F.2d 751 (8th Cir. 1982)	14
<u>Krock v. Electric Motor and Repair Co.,</u> 339 F.2d 73 (1st Cir. 1964)	4
<u>Pollard v. Metropolitan Life Ins. Co.,</u> 598 F.2d 1284 (3rd Cir. 1979)	12
<u>Rovegno v. Geppert Bros., Inc.,</u> 677 F.2d 327 (3rd Cir. 1982)	12
<u>Zerilli v. Smith,</u> 656 F.2d 705, 710 (D.C. Cir. 1981)	11

COUNTERSTATEMENT OF THE CASE

Plaintiffs' Statement of the Case presents several inaccuracies which give a misleading view of this case. The first inaccuracy is the statement that Mrs. Brown was given no instruction by Ski Liberty. While she testified that she received no oral instruction, there were various forms of visual instructions including pictorial instruction boards, instructions on the sled and along the Alpine Slide itself.

The second inaccuracy is the implication that the trial court only permitted discovery of accidents where a sled left the runway, accidents which were unlike the plaintiff's, which was a rearend collision. In fact, plaintiffs were given information concerning all rearend collision accidents which occurred prior to the plaintiff's. In addition to information concerning these accidents, plaintiffs wanted information concerning other accidents, and the trial court's discovery Order was in response to the request for information concerning such other accidents.

With respect to the alleged error concerning the trial court's rulings on permissible cross-examination, plaintiffs' Petition at pages 5-6 implies that counsel was barred from cross-examination on rearend collisions. This implication is simply not true. Counsel had the full opportunity to cross-examine Ski Liberty's manager as to all prior rearend collisions. In fact, a Stipulation of Fact concerning such prior rearend collisions was submitted to the jury.

Lastly, to the extent there might be any inference in the Petition that Ski Liberty willfully withheld the production of the Alpine Slide manufacturer's manual, Ski Liberty wants to bring this Court's attention to the Affidavit of its general manager, Wallace Shank, which was filed with Ski Liberty's Answer to Plaintiffs' Supplemental Post-Trial Motion based on after-discovered evidence. Mr. Shank stated:

"During the discovery of this case, our counsel asked me to produce manuals received from Alpine Slide. In response to this request, I

reviewed all material which Ski Liberty has relating to the Alpine Slide and forwarded to our counsel the manual marked as Exhibit "P-6" at trial. I did not find any other manuals and had no recollection that there might be other manuals received from Alpine Slide Corporation other than Exhibit P-6.

To my recollection, the first time I saw the Alpine Slide Corporation operations manuals for 1977 and 1978 was when they were shown to me at my deposition in the case of Williams v. Ski Roundtop, et al., Civil Action No. 80-0679, on May 5, 1982, marked as Alpine Slide Exhibit 1 and Alpine Slide Exhibit 2. Following this deposition and again at the request of our counsel, I re-reviewed Ski Liberty's records to see if either of the operations manuals had been missed, but again, I was unable to locate those manuals. In addition, in my review of the records, I have never seen copies of correspondence forwarding the operations manuals for 1977 and 1978 as were apparently signed by Adi Richter and Hans Geier."

SUMMARY OF ARGUMENT

There is no reason for this Court to exercise jurisdiction over this case. Plaintiff claims two bases for granting a writ of certiorari: first, an alleged conflict between the circuits because of the First Circuit's decision in Krock v. Electric Motor and Repair Co., 339 F.2d 73 (1st Cir. 1964), and second, a departure from the accepted course of judicial proceedings because of the trial judge's exercise of discretion in limiting the scope of discovery and cross-examination, in declining to give a certain charge to the jury, and in denying Plaintiff's Motion for New Trial on the basis of after-discovered evidence.

With regard to the first claim, there simply is no conflict whatsoever with the First Circuit. In Krock, the First Circuit reached exactly the same result as in the instant case, but for an alternate reason: the Motion for New Trial on the basis of after-discovered evidence was denied for lack of merit. The Krock court never even

dealt with the "cumulative evidence" issue, which was the basis for the ruling in the instant case.

As to the second allegation, an examination of the trial judge's reasoning makes it clear that she did not act arbitrarily or irrationally, but rather that she acted within her discretion. The judge did not allow discovery and cross-examination to extend to issues which she believed would add nothing to the trial. She declined to give plaintiff's requested Point for Charge number 4 where that point pertained to an issue the jury was not deciding. Finally, she denied Plaintiff's Motion for New Trial on the basis of after-discovered evidence because she determined that the after-discovered evidence was merely cumulative and had already been vigorously argued at trial. After applying the appropriate standards of review, Ski Liberty believes, and the Third Circuit obviously agreed, that the Judge's rulings were a proper exercise of her discretion. Thus there was no substantial departure

from accepted law so as to require the
Supreme Court to hear this case.

ARGUMENT

- A. The Third Circuit's Judgment Order in this case, affirming the District Court's judgment, does not conflict with the First Circuit's decision in Krock.

Petitioner claims that the Third Circuit has "rendered a decision" which conflicts with the First Circuit's decision in Krock. Petition for Certiorari at 12. First of all, it must be noted that the Third Circuit rendered no decision in this case. Rather, the Third Circuit merely affirmed, by judgment order, the decision of the District Court. Even treating this affirmance as a decision by the Third Circuit, there is simply no conflict with the First Circuit. In both Krock and the present case, Motions for New Trial on the basis of after-discovered evidence were denied. Further, Krock dealt with an issue that the trial court did not deal with in this case, i.e., due diligence.

Krock was a contract action in which plaintiff's witness gave uncorroborated oral

testimony as to lost profits. The case resulted in a verdict for the plaintiff, and the defendant moved for a new trial, alleging that a material portion of the witness' testimony had been untruthful. The motion was denied on grounds of lack of diligence and lack of merit. With regard to lack of diligence, the District Court indicated that if defendant had made full use of pretrial discovery, he could have ascertained the testimony and the errors in that testimony. On appeal, the First Circuit found that while in some circumstances failure to use pretrial discovery procedures might be negligence, there was no "general duty to ascertain such ever evidence as plaintiff might offer by way of damages" That court further noted that "defendant could hardly have anticipated" the "suspicious circumstances" surrounding the testimony. Thus there was no lack of diligence. However, the First Circuit affirmed the denial of a new trial, on the basis of lack of merit, emphasizing the "strong showing" necessary to obtain a new trial.

In the instant case, plaintiff's Motion for New Trial on the basis of after-discovered evidence was also denied, but for an entirely different reason: the trial court determined that the after-discovered evidence was cumulative, and was "not of such a nature that a new trial would produce a different result." Petition for Certiorari at A-14. The trial court never discussed or even alluded to the diligence question. Rather, Judge Rambo's analysis began: "The court will focus its discussion on whether the evidence is cumulative." Petition for Certiorari at A-13. It is hard to imagine how the basis for the decision could be more clearly delineated, or made more clearly distinguishable from Krock. Two decisions in different circuits which arrive at the same result on alternate grounds, simply do not present a conflict "on the same matter" so as to merit this Court's jurisdiction.

B. The Third Circuit has not sanctioned any departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervision.

Plaintiffs, in their appeal to the Third Circuit, contended that the trial court had erred in failing to grant a new trial (1) on the basis of newly discovered evidence, (2) because discovery had been improperly limited, and (3) because of the court's refusal to give a charge consistent with plaintiffs' request to charge Number 4¹. The Third Circuit found no merit in any of plaintiffs' contentions, and entered a judgment order affirming the judgment of the District Court. An examination of Judge Rambo's reasoning and of the standards of review applicable to her rulings, shows no departure from the usual, accepted course of judicial proceedings.

¹A fourth error alleged by the plaintiffs in that appeal, that the verdict was against the weight of evidence, is not raised in the Petition for Certiorari.

1. The Trial Court did not abuse its discretion in limiting the scope of discovery and cross-examination.
-

Plaintiffs claim that Judge Rambo should have ordered the disclosure of all "speed-related" accidents. The standard of review applied by the Court of Appeals in considering a discovery ruling was whether the ruling was an abuse of discretion. Zerilli v. Smith, 656 F.2d 705, 710 (D.C. Cir. 1981); Borden Company v. Sylk, 410 F.2d 843, 845 (3rd Cir. 1969). Judge Rambo here allowed discovery as to all cases of rearend collisions, and all cases where the sleds left the track. However, the judge found that "the information on all speed-related cases was simply not relevant to the issues involved in the case." Petition for Certiorari at A-11. Those issues were whether Ski Liberty breached its duty to plaintiff or failed to act in a reasonable manner in terms of alerting, instructing, and preventing sledders from rear-ending each other. Further, the judge held that the term "speed-related" was "too general. Presumably all accidents on the slide could be related to

speed. To place into evidence each and every accident that happened would have served no useful purpose." Petition for Certiorari at A-12.

Judge Rambo restricted the scope of cross-examination of Ski Liberty's manager, for the same reason: information on all speed-related cases was simply not relevant to the issues involved in the case. The standard of review for the Court of Appeals in reviewing the trial judge's evidentiary ruling is, again, whether there was an abuse of discretion. Rovegno v. Geppert Bros., Inc., 677 F.2d 327, 333 (3rd Cir. 1982); Pollard v. Metropolitan Life Ins. Co., 598 F.2d 1284, 1286 (3rd Cir. 1979).

Judge Rambo's reasoning shows that her evidentiary rulings were not arbitrary or irrational; rather, the rulings were based on her determination that the evidence was not relevant to the issue of Ski Liberty's conduct "in terms of alerting, instructing, and preventing sledders from rear-ending each other." Thus, because the exclusion "was

not arbitrary or irrational, it was not an abuse of discretion." Rovegno, 677 F.2d at 331. The Third Circuit, through its judgment order, obviously agreed that these rulings were not an abuse of discretion.

2. The trial court did not err in refusing to instruct the jury on plaintiff's requested Point for Charge number 4.

Plaintiffs claim that the trial court's refusal to instruct the jury in accordance with Plaintiff's Point for Charge number 4, which provided that the plaintiff had no duty to foresee the negligence of another patron, constituted a trial error.

Judge Rambo's opinion plainly sets forth the reasons for not including that proposed charge:

"The court previously ruled that based upon the facts of this case, assumption of risk and comparative negligence were not issues in the case. To have given plaintiff's instruction #4 would have injected issued into the case that were not present."
Petition for Certiorari at A-12.

The standard of review when considering an alleged error in the charge to the jury

is twofold: First, in the context of the case, was the charge as given erroneous. Second, even if there was error in the jury instruction, such error is reversible only if it "adversely affect[s] the substantial rights of the complaining party." Hallberg v. Brasher, 679 F.2d 751, 757 (8th Cir. 1982).

Ski Liberty obviously believes Plaintiffs' Point for Charge number 4 was correctly omitted. Further, failure to give that charge could not be reversible error, because there was no adverse effect on any substantial right of the plaintiffs. Simply put, the Point for Charge dealt with an issue that the jury was not deciding. Failure to instruct regarding something that was not being decided cannot be considered to have adversely affected a substantial right. Plaintiffs do not even suggest which rights were affected, or what the effect allegedly was; rather, plaintiffs merely make the sweeping allegation that their Due Process rights for full and fair hearing were violated. The Third Circuit, through its Judgment Order,

obviously agreed with Judge Rambo: failure to give the charge was not error.

3. The trial court did not abuse its discretion in denying Plaintiffs' Motion for New Trial on the basis of newly discovery evidence.

Plaintiffs claim that the newly discovered evidence in the form of Alpine Slide Operations Manuals entitles them to a new trial. As was discussed supra, Judge Rambo, who had seen and heard all the evidence presented at trial, specifically found that the manuals constituted cumulative material and were not of such a nature that a new trial would produce a different result. Judge Rambo further stated:

"Nothing set forth in the manuals themselves constituted information or evidence not already presented at trial. Each of the five standards [mentioned in the manuals] were issues in the trial and were vigorously argued." Petition for Certiorari at A-14.

The standard of review applied by the court of appeals in reviewing the denial of a Motion for New Trial was whether there was a clear abuse of discretion. Giordano v.

McCartney, 385 F.2d 154, 155 (3rd Cir. 1967).

The Third Circuit obviously found no such abuse, concluding that there was "no merit" to the contentions that the trial court had erred in not granting a new trial on the basis of newly discovered evidence.

Finally, plaintiffs' allegations that Ski Liberty withheld evidence have been refuted by Ski Liberty's Answer to Plaintiff's Supplemental Post-Trial Motions and by the Affidavit of Wallace Shank (Ski Liberty's manager). Both the trial court and the Third Circuit obviously found no merit to plaintiffs' claims.

In sum, nowhere does it appear that there has been any departure from the usual, accepted course of judicial proceedings. Rather, the record plainly supports the Third Circuit's conclusion that Judge Rambo had acted within her discretion in not extending the scope of discovery and cross-examination to irrelevant issues, in declining to give an unnecessary charge to the jury, and in denying the Motion for New

Trial where the after-discovered evidence was merely cumulative.

CONCLUSION

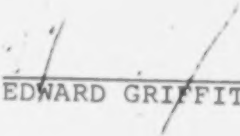
The instant case presents no "special and important reasons" for granting certiorari. There is no conflict with any other circuit, nor has there been any departure from the usual course of judicial proceedings. All of the issues raised on appeal involve the discretion of the trial court. While the plaintiffs clearly do not like the result of the exercise of that discretion, there is no showing that the exercise of discretion was contrary to the well established, relevant standards. In sum, there is no basis for a grant of certiorari under the rules of this Court.

Ski Liberty respectfully requests that
the Petition for Certiorari be denied.

DUANE, MORRIS & HECKSCHER

BY: Edward Griffith
Hugh M. Emory
 Attorneys for Respondent

I, EDWARD GRIFFITH, do hereby certify
that I am a member of the Bar of the Supreme
Court of the United States.



EDWARD GRIFFITH